Supreme Court, U.S.
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No. 00-666

In The

Supreme Court of the United States

PHYLLIS R. CREGO now SOCK,

Petitioner,

v.

KERMIT L. COLEMAN,

Respondent.

On Petition For Writ Of Certiorari To The Michigan Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

This court has been requested to consider the constitutionality of a repealed section of the Paternity Act, MCL 722.713; MSA 25.493 which allows the mother of an illegitimate child to enter into a nonmodifiable agreement with her child's putative father when a paternity action was filed, the child's mother and putative father voluntarily entered into an agreement regarding child support in lieu of a judicial determination of paternity, the court made a determination that the agreement secured adequate provision for the child's needs, and the agreement made no provisions for modification. This Court's equal protection analysis necessary includes the question of whether the statute under consideration is one based on illegitimacy or paternity and whether the corresponding standards of review have been met.

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The trial Court's Order dated January 30, 1981, is found at Pet. App. at 112a. The trial Court's modification of support is found at Pet. App. at 110a.

Michigan Court of Appeals decisions are reported at *Crego v. Coleman*, 201 Mich. App. 443; 506 N.W. 2d 568 (1993) *(Crego I)* affirmed lower Court, 226 Mich. App. 815, 817; 573 N.W. 2d 291 (1997) *(Crego II)* overruling the trial Court's subsequent modification, and 232 Mich. App. 284; 591 N.W. 2d 277 (1998) *(Crego III)* overruling *Crego I* and *II*.

The opinion of the Michigan Supreme Court (Pet. App. at 1a-43a) is reported at 463 Mich. 248, 615 N.W. 2d 218 (2000) *(Crego IV)*.

STATUTORY PROVISIONS INVOLVED

Former § 3 of the Paternity Act, MCL 722.711 et seq.; MSA 25.491 et seq. Section 3 provided as follows:

> (a) An agreement or compromise made by the mother or child or by some authorized person on their behalf with the father concerning the support and education of the child shall be binding upon the mother and the child only when the Court having jurisdiction to compel support and education of the child shall have determined that adequate provision is reasonably secured by payment or otherwise and has approved the agreement or compromise.
>
> (b) The performance of the agreement or compromise, when so approved, shall bar other

> remedies of the mother or child for the support and education of the child. [MCL 722.713; MSA 25.493]

STATEMENT OF THE CASE

Respondent would adopt the analysis and treatment of § 3 of the Paternity Act as set forth under Pet. App. at 117a and all properly cited holdings in Petitioner's Statement, which Respondent perceives to be accurate with the exception of Petitioner's citation of *Sturak v. Ozomaro*, 238 Mich. App. 549, 606 N.W. 2d 411 (1999), and the Supreme Court case.

In *Sturak*, the Court's summarizes its holding as follows:

> In summary, our decision regarding retroactivity generally applies to illegitimate minor children not subject to orders of filiation who are parties to purportedly nonmodifiable § 3 settlement agreements, permitting these minors to seek modification of their settlement agreements. Our decision does not apply to individuals who no longer are entitled to parental support. MCL 722.1(a), 722.3; MSA 25.244(1)(a), 25.244(3); MCR 3.211 (E)(2).

Pet. App. at 135. Thus limiting full retroactivity claimed by the Petitioner.

Under the case under consideration the Court is applying the rational basis test and viewing the statute as " . . . one which merely differentiates on the basis of whether paternity has been ascertained". Pet. App. at 29a. The Court did find the statute as " . . . rationally related to the legitimate stated interest of ensuring that

minor children born out of wedlock are provided with support and education." Pet. App. at 29a.

The Court thereafter held that even if the statute was one that distinguishes children based on illegitimacy, that it " . . . substantially and directly advances this [providing support for illegitimate children] important interest". (Pet. App. at 29a).

The Petitioner even at this stage of the proceedings makes allegations relating to the Petitioner's and Respondent's financial circumstances throughout the twenty years of proceedings which have never been properly admitted at an evidentiary hearing or otherwise been subject to cross examination (see Pet. p. 4). Respondent further denies the representations of Petitioner which allegedly existed at the time of the original Order in that she was represented by the prosecutor and counseled against entering into the agreement by Friend of the Court representatives present at the time. (Pet. p. 3). These unsubstantiated allegations have not been addressed by any of the many Court decisions and even if true, which is denied, they are at least irrelevant.

REASONS FOR DENYING THE WRIT

THE SUPREME COURT'S RULING DOES NOT CONFLICT WITH THE EQUAL PROTECTION CLAUSE OR PRIOR PRECEDENT.

A. THE STATUTE DOES NOT CREATE A CLASSIFICATION BASED ON ILLEGITIMACY.

When government in its legislative capacity bestows benefits or detriments to individuals that are similarly

situated the results should be similar, the individuals it affects should be expected to be treated the same.

The guiding star of equal protection requires;

> . . . that the government not treat persons differently on account of certain largely innate, characteristics that do not justify disparate treatment (Pet. App. at 8a).

One such characteristic that is scrutinized under equal protection for the basis of different treatment is illegitimacy. Pet. App. at 9a. This scrutiny, the Supreme Court held in cases of illegitimacy denies the state the ability to "invidiously discriminate against illegitimate children by denying them substantial benefits accorded to children generally." Pet. App. at 10a. See also *Gomez v. Perez*, 409 U.S. 535, 538, 93 S. Ct. 872; 35 L. Ed. 2d 56 (1973).

The Petitioner's case weaves these holdings together, holds them up to the light of the instant case and sees a lumination. The illegitimate child in this case may not be treated differently from other children generally (i.e. legitimate children). If the Petitioner would however analyze the child support provisions and Court rulings of Michigan as the Supreme Court did no such light occurs.

Clearly the statute only effects those illegitimate children who the Court noted meet certain common elements.

> . . . (1) a paternity action was filed; (2) the child's mother and putative father voluntarily entered into an agreement regarding child support, in lieu of a judicial determination of paternity; (3) the Circuit Court made a determination

> that the agreement secured "adequate provision" for the child's needs; and (4) the agreement failed to include language preserving the right to modify support levels at a later time. Pet. App. at 5a.

There are other classifications of illegitimate children that do not fall within this category rendering the statute not one based on legitimacy, but rather paternity. Further the Court noted that under the Statute there are a "variety of situations under which illegitimate children receive the same right to fully modify support as children born during marriage. Pet. App. at 7a.

The existence of illegitimate children who would be treated the same as children born during marriage under the applicable statutes necessarily precludes the statute being characterized as based on illegitimacy, but rather as one distinguishing "between children whose paternity has not been ascertained and children whose paternity has been ascertained". Pet. App. at 28a.

The Supreme Court noted just such a holding in *Frame v. Nehls*, 208 Mich. App. 412, 416; 528 N. W. 2d 773 (1995) when the Court noted that the treatment was not based on illegitimacy, and refused to grant relief based upon classification of illegitimacy. Pet. App. at 12a. And again in *Geduldig v. Aiello*, 417 U.S. 484 (1974), when the Court made a similar distinction between pregnant women and nonpregnant persons and similarly de-constructed a class to a sub-classification of a larger group, Pet. App. at 14a, and by analysis in the instant case to the class of illegitimate children to the sub-class of illegitimate children who have not determined paternity. Pet. App. at 14a.

B. THE SUPREME COURT'S DECISION IS CONSISTANT WITH PRIOR STATE AND UNITED STATES SUPREME COURT PRECEDENTS.

The Petitioner's contention that the Supreme Court's ruling contributes to "fractured decisions" or violates prior precedent within the state evaporates when the cases are analyzed constant with their factual distinctions.

The Supreme Court's prior rulings in *Hisaw v. Hayes,* 133 Mich. App. 639, 350 N. W. 2d 302 (1984), is constantly applied and *Dones v. Thomas,* 210 Mich. App. 674; 534 N. W. 2d 221 (1995), *Sturak v. Ozomaro,* 238 Mich. App. 549; 606 N.W. 2d 411 (1999), *Frame v. Nehls,* 208 Mich. App. 412, 416; 528 N. W. 2d 773 (1995), all retain their force when one merely recognizes that the distinctive fact of an acknowledgment of paternity is present in those cases setting aside the statute as compared to those of *Hisaw,* and the instant case where the acknowledgment is not present.

The Court's rationale in these cases for the modification of support can be supported on numerous fronts, suffice it to say that in Michigan once the putative father has acknowledged paternity, his child is entitled to fully modifiable support, just as any other child whose paternity has been ascertained. Pet. App. at 24a.

In addition, the Supreme Court to view the statute as definitively on the basis of whether paternity has been acknowledged, as compared to one based on illegitimacy. (Pet. App. at 29a). And its findings of constitutionality is consistent with the State Court's rulings to allow modification in those instances of acknowledgment of paternity and not those where the acknowledgment is absent.

Hisaw v. Hayes, 133 Mich. App. 639, 350 N.W. 2d 302 (1984). *Crego v. Coleman, (Crego I)*, 201 Mich. App. 443, 506 N.W. 2d 568 (1993).

The decision is also supportive and consistent with this Court's prior decisions. The Petitioner relies on *Gomez v. Perez*, 409 U.S. 535, 93 S. Ct. 872, 35 L. Ed. 2d 56 (1973) is affirmed in light of the previous analysis that an illegitimate class is not present.

Clark v. Jeter, 486 U.S. 456 (1988), and *Mills v. Habluetzel*, 456 U.S. 91 (1982) are distinguished by the Michigan Supreme Court in their scope:

> Neither *Mills* nor *Clark* require us to reach the conclusion that the statute challenged here created classifications on the basis of illegitimacy; in neither of those cases did the Court address the threshold question whether the challenged statutes actually created classifications on the basis of legitimacy. The dissent states, "I conclude that the [Clark] Court did find that the statute created a classification on the basis of legitimacy." Slip op., p. 5, n. 4 (KELLY J., dissenting). However, Justice Kelly reaches this conclusion, not because the Court expressly decided that the statute created classifications on the basis of illegitimacy, but rather because the Court examined the statute under intermediate scrutiny. We find the dissenter's analysis flawed. In both *Mills* and *Clark*, the Supreme Court was examining statutory periods of limitation applicable to all illegitimate children. Unlike the statute before us, the statutes challenged in *Mills* and *Clark* imposed a requirement on all illegitimate children – either ascertain paternity within the allotted time frame or

be forever precluded from access to child support. So even though we conclude, for argument's sake, that the statutes in *Mills* and *Clark*, as applied, could be characterized as creating classifications either on the basis of illegitimacy or on the basis of whether paternity had been determined, there are significant differences between those cases and the instant case that could lead the same Court to opposite results. Specifically, the statutes challenged in *Mills* and *Clark* created a mandatory prerequisite to child support for all illegitimate children – prove paternity within the period of limitation. By contrast, the instant statute created options – prove paternity, obtain a nonmodifiable support agreement, or even obtain a modifiable support agreement. Consequently, even if we were to agree that the Supreme Court reached a decision that it did not expressly address, and even if we were to agree that such implicit decision making was binding on this Court, *Mills* and *Clark* do not require a conclusion that the challenged statute creates an illegitimacy based classification; those cases are readily distinguishable from the instant case on their facts.

Even more importantly, the *Clark* Court was careful to point out that statutory classifications based on illegitimacy designed to punish the conduct of parents were different than statutory classifications based on illegitimacy designed to address paternity proof problems in the support context. *Clark, supra* at 461. The disputed statute here, to the extent that it treated illegitimate children differently than legitimate children, addressed the later issue. That is, the challenged

> statute provided an alternative means of obtaining support for a child where paternity was uncertain. Pet. App. at 17a.

The same rationale is applicable to *Picket v. Brown*, 462 U.S. 1, 103 S. Ct. 2199, 76 L. Ed. 2d 372, (1983) and all other cases seeking modification of support to the class of illegitimate children as a whole.

Consistent with the Michigan rulings as well, as clearly distinguishable is Petitioner's reliance on *Gerhardt v. Estate of Moore*, 150 Wis. 2d 563; 441 N.W. 2d 734 (1989) where the Supreme Court acknowledged the application of restrictions to the whole class of illegitimate children.

> Even presuming, however, that *Gerhardt* was correctly decided, that case is clearly distinguishable on its facts. First, the statute challenged in Wisconsin allowed nonmodifiable settlement agreements in all paternity actions, regardless of whether paternity had been admitted or ascertained by the Court. Contrary to Justice Kelly's conclusion, this is a distinction with a crucial difference. See Slip op. at 11, n. 10 (Kelly, J., dissenting). MCL 722.713; MSA 25.493, allows nonmodifiable support agreements only where paternity has not been ascertained, a distinction illustrating the clear relationship between the Michigan statute and paternity proof problems. *Id.* at 566.
>
> . . . thus, if we were faced with the same facts as those before the Wisconsin Supreme Court, we cannot say whether we would reach a different conclusion . . . Pet. App. 24a, 25a.

Clearly, there is not the confusion of factual decisions espoused by the Petitioner. When the statute is compared

with both state and federal decisions that have comparable facts the decision of the Supreme Court is consistent with those holdings. The holding of the Michigan Supreme Court was proper in all respects and does not call for a review by this Court.

C. THE MICHIGAN STATUTE COMPLIES WITH THE APPLICABLE STANDARDS OF REVIEW

Equal protection determinations are reviewed under one of three applicable standards. Under the strict scrutiny standard classifications based upon suspect factors such as race, national origin, ethnicity alienage or other fundamental interests are upheld only "if the State demonstrates that its classification scheme has been precisely tailored to serve a compelling interest:" *Doe v. Dept. of Social Services*, 439 Mich. 650, 662; 487 N.W. 2d 166 (1992), *City of Plylen v. Doe*, 457 U.S. 202, 216, 217; 102 S. Ct. 2382; 72 L. Ed. 2d 786 (1982) (also see Pet. App. at 61a).

The rational basis test upholds a classification if the scheme it creates "is rationally related to a legitimate governmental purpose". *Dandridge v. Williams*, 397 U.S. 471, 485; 90 S. Ct. 1153; 25 L. Ed. 2d, 491 (1970) (See Pet. App. at 64a). The third classification known as heightened scrutiny acknowledges that the legislature at times needs to make distinctions even between classes containing innate characteristics. Illegitimacy is just such a classification. This standard was adopted under *Clark v. Jeter*, 4586 U.S. 456; 108 S. Ct. 1910; 100 L. Ed. 2d 465 (1988) when that Court held:

> To withstand intermediate scrutiny, a statutory classification must be substantially related

> to an important governmental objective. Consequently we have invalidated classifications that burden illegitimate children for the sake of punishing the illicit relations of their parents, because "visiting this condemnation on the head of an infant is illogical and unjust." *Clark v. Jeter, supra* at 461.

Rather than relying merely on the rational basis standard as the classification did not affect the class of illegitimate children as a whole, but rather a sub-class of illegitimate children whose fathers had not admitted paternity, the Court also analyzed the statute in question as though illegitimacy was the class and here as well the statute met this higher qualification in that the statute was substantially related to an important governmental objective. These the Court concluded, included the following:

1. The goal of obtaining child support for illegitimate children.
2. The states legitimate concern regarding proof problems in the child support context. Pet. App. at 28a.

In order for this Petitioner to invalidate the Supreme Court's ruling, these objectives must not be met by the application of the statute. They are however not only acknowledged, they are relied upon by the dissent, which the Petitioner has adopted. (Pet. App. at 34a)

Further, even if *Gerhardt* was properly decided, as is the contention of the Petitioner, it is distinguishable in that:

> . . . the statute challenged in Wisconsin allowed nonmodifiable settlement agreements in all

paternity actions, regardless of whether paternity and been admitted or ascertained by the Court. Contrary to Justice Kelly's conclusion, this is a distinction with a crucial difference. See Slip op. at 11, n. 10 (Kelly, J., dissenting). MCL 722.713; MSA 25.493, allows nonmodifiable support agreements only where paternity has not been ascertained, a distinction illustrating the clear relationship between the Michigan statute and paternity proof problems. Second, the defendant in *Gerhardt* acknowledged paternity, *id.* At 566. It is true, as Justice Kelly observes, that the Wisconsin Supreme Court did not consider the defendant's admission of paternity in reaching its decision. Slip op. at 12, n. 10 (Kelly, J., dissenting). We point out however, that in Michigan, once a putative father has acknowledged paternity, his child is entitled to fully modifiable support, just as any other child whose paternity has been ascertained. MCL 722.1004; MSA 25.604. It is only where paternity is uncertain that nonmodifiable child support is allowed. Thus, if we were faced with the same facts as those before the Wisconsin Supreme Court, we cannot say whether we would reach a different conclusion. Clearly, under Michigan law, a defendant similarly situated to the defendant is *Gerhardt*, that is, one who has made a legal acknowledgment of paternity, would be required to provide fully modifiable child support, and the case would not be before us – a distinction with a clear difference. Pet. App. at 23a, 24a, and 25a.

Petitioner's attempt to use *Gerhardt* as a banner fails. To use this case as a guide the putative father in the instant case must have acknowledged paternity. He did

not. Had an acknowledgment of paternity been present the interest and goals previously cited would be inapplicable. This is the basis of that line of cases lead by *Gerhardt*. To adopt the Petitioner's rational and that of Justice Kelly, one would have to ignore the facts that the statute does not effect all illegitimate children and that there is no immutable difference between legitimate and illegitimate children. As the Court said, "ascertaining paternity with certainty is such a difference." (Pet. App. at 22a).

The Michigan Supreme Court's ruling in no way jeopardizes the ruling in *Gomez* or *Gerhardt*, it acknowledges and upholds real differences in facts, proofs, and goals and provides a fair and workable framework to accomplish the state's legitimate interest of proving support for children. The conflict addressed by the Petitioner does not exist, and a review by this Court of the instant cases by the application of a dissimilar set of facts and statutory scheme is unnecessary and of no value.

CONCLUSION

For all the foregoing reasons, Respondents respectfully request that this Honorable Court deny the Petition.

Respectfully submitted,

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